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<b>P.S., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 20-1090</b>
	)	<b>Issued: September 9, 2021</b>
<b>DEPARTMENT OF AGRICULTURE, FOOD</b>	)	
<b>SAFETY &amp; INSPECTION SERVICE,</b>	)	
<b>Scranton, PA, Employer</b>	)	
	)	

### Case Submitted on the Record

Before:  
ALEC J. KOROMILAS, Chief Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

On April 27, 2020 appellant filed a timely appeal from an April 2, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated June 17, 2019, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On April 26, 2018 appellant, then a 69-year-old slaughter inspector, filed a traumatic injury claim (Form CA-1) alleging that on that day he slipped and fell while exiting a freezer, injuring

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

his left knee, right shoulder, and right side of the body while in the performance of duty.<sup>2</sup> On the reverse side of the claim form, the employing establishment checked a box marked “No” indicating that he was not in the performance of duty at the time of the alleged incident. It explained that while appellant was on the employing establishment premises during work hours, he was not performing his assigned duties or in the area in which he would have been performing his assigned duties/responsibilities at the time of the alleged employment incident. Appellant did not stop work.

In April 27, 2018 progress notes, Dr. Christine M. Stroka, Board-certified in family medicine, noted that appellant fell at work on April 26, 2018, injuring his right shoulder and left knee. She conducted a physical examination and diagnosed right shoulder contusion, right shoulder rotator cuff syndrome, chronic bilateral low back pain with left-sided sciatica, protruding lumbar disc, and bilateral foot drop.

A May 4, 2018 right shoulder x-ray revealed some mild degenerative changes.

In May 14, 2018 progress notes, Dr. Steven A. Sluck, Board-certified in family medicine, noted that appellant fell at work, landing on his right shoulder. He diagnosed right shoulder joint pain, right shoulder syndrome, and obesity. In a medical note of even date, Dr. Sluck excused appellant from work indefinitely.

Appellant, in a May 22, 2018 statement, asserted that he slipped and fell at work on April 26, 2018, striking his right shoulder on the floor. He noted having difficulty raising his arm upward from his side to any more than a 45 degree angle. Appellant continued to work on April 27, 2018 and indicated that he could initially use his right arm with pain medication, but as a result of increasing pain in the right shoulder he had to primarily use his left hand. He contended that there was no doubt that his doctor believed his current shoulder condition was a direct result of the alleged April 26, 2018 employment incident.

In support of his claim, appellant also submitted medical evidence predating the alleged April 26, 2018 employment incident. An April 9, 2018 magnetic resonance imaging (MRI) scan of the right shoulder revealed tendinopathy of the rotator cuff, small partial thickness tears of the distal supraspinatus and subscapularis tendons, acromioclavicular (AC) arthrosis, mild joint effusion, mild fluid in the subacromial subdeltoid bursa, a limited evaluation of the glenoid labrum due to motion degradation, as well as a questionable tear of the inferior labrum and a small cluster of inferior paralabral cysts. In April 13, 2018 progress notes, Dr. Sluck diagnosed right shoulder rotator cuff syndrome, tearing of the right glenoid labrum, right shoulder joint pain, obesity, and hyperlipidemia. In April 23, 2018 progress notes, Dr. Shazad L. Shaikh, an orthopedic surgery specialist, noted that appellant experienced right shoulder pain from a January 2018 injury. He diagnosed right shoulder rotator cuff impingement syndrome and right osteoarthritis of the AC joint and the glenohumeral joint.

A May 30, 2018 MRI scan of the right shoulder demonstrated stable high-grade articular surface tearing of the anterior right supraspinatus with associated moderate tendinopathy, stable mild right infraspinatus tendinopathy, and stable degenerative right labral tearing with associated

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<sup>2</sup> Appellant has a previously accepted January 4, 2018 traumatic injury claim that was accepted for a left knee contusion and right thigh muscle strain under OWCP File No. xxxxxx517. OWCP has not administratively combined these files.

small inferior paralabral cyst formation. It also noted that the overall appearance of the rotator cuff was unchanged from the April 9, 2018 right shoulder MRI scan.

In June 4, 2018 progress notes, Dr. Leslie A. Lyness, a neurosurgeon specialist, noted that appellant had fallen seven times within the past years. She diagnosed multi-level lumbar degenerative disc disease with radiculopathy and functional quadriceps weakness.

In June 25, 2018 progress notes, Victoria Nytech, a physician assistant, indicated that appellant previously fell in January and again “approx[imately]” May 2018.<sup>3</sup> She noted that he had mild shoulder pain from the January 2018 fall and diagnosed right high grade partial thickness of the rotator cuff, right biceps tendinitis, and right osteoarthritis of the AC joint and the glenohumeral joint. In a medical note of even date, Ms. Nytech indicated that appellant was scheduled for right shoulder surgery on July 3, 2018 and would need four to six months to recover.

In a July 2, 2018 attending physician’s report (Form CA-20), Dr. Shaikh noted that appellant’s recent fall<sup>4</sup> worsened his preexisting small partial rotator cuff tear from the January 2018 fall. He diagnosed high grade partial thickness and an incomplete rotator cuff tear. Dr. Shaikh opined that appellant’s recent fall advanced his preexisting rotator cuff tear to a point where it usually would not heal on its own and that repetitive activity with the right arm could make his condition worse.

In a July 3, 2018 development letter, OWCP informed appellant that his claim was initially accepted as a minor injury, but was now being formally considered because he had requested authorization for surgery. It advised him of the factual and medical evidence necessary to establish his claim and provided a questionnaire for his completion. In a separate letter of even date, OWCP requested additional information from the employing establishment. It afforded both parties 30 days to provide the requested evidence.

In a July 6, 2018 response to OWCP’s questionnaire and in a July 18, 2018 statement, appellant reiterated that his injury occurred while in the performance of duty on April 26, 2018. In a July 13, 2018 letter, the employment establishment reiterated that appellant had no specific responsibilities or duties in the area where his injury occurred.

By decision dated August 17, 2018, OWCP accepted that the April 26, 2018 employment incident occurred, as alleged. However, it denied appellant’s traumatic injury claim, finding that the evidence of record was insufficient to establish that the diagnosed medical conditions were causally related to the accepted April 26, 2018 employment incident.

In a July 12, 2018 letter, Dr. Shaikh noted that appellant was seen on April 23, 2018 for right shoulder pain caused by a fall in January 2018. He indicated that he was seen again on June 25, 2018 after falling for the second time in April, which worsened his shoulder pain. Dr. Shaikh opined that the May 30, 2018 MRI scan showed progression of appellant’s rotator cuff tear to a high grade rotator cuff tear. He explained that a repetitive shoulder motion could also

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<sup>3</sup> In a July 9, 2018 letter, Ms. Nytech noted that appellant’s date of injury was incorrectly listed as May 2018 when it should have been noted as April 2018.

<sup>4</sup> OWCP subsequently received another copy of Dr. Shaikh’s July 2, 2018 Form CA-20. The report was identical to his July 2, 2018 report except that the date of injury was corrected from May to April 2018.

cause the progression of his rotator cuff tear. Dr. Shaikh indicated that appellant underwent surgery on July 3, 2018.

On August 28, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a September 6, 2018 statement, appellant explained that his previous January 2018 fall occurred when he slipped on unseen black ice and fell while performing an ante-mortem inspection.

In an October 24, 2018 letter, Dr. Shaikh reiterated that appellant had been under his care since April 23, 2018 for right shoulder pain as a result of a work-related fall in January 2018. He reported that he fell again on April 26, 2018, reinjuring his right shoulder. Dr. Shaikh repeated that the May 30, 2018 MRI scan demonstrated progression of a rotator cuff tear. He indicated that appellant was recovering well from his July 3, 2018 surgery and expected to return to full-time work on October 29, 2018. In an undated letter, Dr. Shaikh again opined that there was a clear progression of the rotator cuff tear due to the April 26, 2018 fall.

In a November 20, 2018 memorandum of telephone call (Form CA-110), appellant explained that after his previous January 3, 2018 fall he did not initially experience right shoulder pain until March 2018. He indicated that he had no other injury to the right shoulder prior to January 2018.

By decision dated November 27, 2018, OWCP's hearing representative set aside the August 17, 2018 decision and remanded the case for referral to an OWCP district medical adviser (DMA) to review the medical evidence of record and requested an explanation as to whether there was causal relationship between appellant's diagnosed progression of right shoulder tears and the accepted April 26, 2018 employment incident.<sup>5</sup>

In a July 3, 2018 surgery note, Dr. Shaikh indicated that appellant underwent surgery including right shoulder arthroscopy (rotator cuff repair), biceps tenotomy, extensive debridement, subacromial decompression with acromioplasty, and bone marrow aspiration.

On December 18, 2018 OWCP forwarded a statement of accepted facts (SOAF) and appellant's medical record to Dr. Kevin Kuhn, a Board-certified orthopedic surgeon serving as the DMA, for an opinion as to whether appellant's preexisting conditions progressed to the diagnosis of right rotator cuff tears and whether the July 3, 2018 right shoulder surgery was warranted.

In his January 13, 2019 report, Dr. Kuhn reviewed the SOAF and medical records, including the April 9 and May 30, 2018 MRI scans of the right shoulder, and opined that there was no significant objective change in the magnitude or quality of the supraspinatus or subscapularis partial thickness tears to indicate that the accepted April 26, 2018 employment incident resulted in progression of appellant's preexisting conditions as his tears were already present before his

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<sup>5</sup> The hearing representative noted that the medical evidence did not support that appellant sustained a right shoulder injury as a result of the previously accepted January 4, 2018 employment injury.

April 26, 2018 injury. He concluded that the July 3, 2018 surgery was not related to any pathology caused by the accepted April 26, 2018 employment incident.

By decision dated January 28, 2019, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record was insufficient to establish causal relationship between his diagnosed conditions and the accepted April 26, 2018 employment incident. It noted that medical treatment was not authorized and any prior authorization should be terminated.

In a February 21, 2019 letter, Dr. Shaikh reiterated that appellant had been under his care since April 23, 2018 and noted that he initially sustained a right shoulder injury from a previous work-related fall in January 2018. He indicated that the May 30, 2018 right shoulder MRI scan demonstrated a clear progression of the tear in size warranting surgical intervention. Dr. Shaikh explained that a radiology report may not take into account the finer detail of the tear progression that would distinguish between tears that may or may not need surgery, which would require a surgeon to determine. In an undated supplemental letter, he noted that the May 30, 2018 MRI scan revealed new tears that were not initially apparent on the April 9, 2018 MRI scan. Dr. Shaikh opined that the April 26, 2018 fall was "a sufficient mechanism to aggravate and cause tear progression" of appellant's right shoulder rotator cuff.

OWCP received a compact disc read-only memory (CD ROM) and a digital video disc (DVD) containing images from previously submitted diagnostic studies.

On March 21, 2019 appellant requested reconsideration.

By decision dated June 16, 2019, OWCP denied modification of its January 28, 2019 decision.

On January 3, 2020 appellant again requested reconsideration.

In a December 12, 2019 supplemental letter to his February 21, 2019 letter, Dr. Shaikh clarified that the accepted April 26, 2018 employment incident was "the sufficient mechanism to aggravate and cause tear progression of his right rotator cuff."

In an undated statement, appellant summarized evidence submitted and argued that the hearing representative had already accepted that Dr. Shaikh's reports showed causal relationship and that his surgery was related to one of his accepted employment traumas, including the one he experienced in January 2018.

By decision dated April 2, 2020, OWCP denied appellant's request for reconsideration of the merits of the claim under 5 U.S.C. § 8128(a), finding that Dr. Shaikh's December 12, 2019 letter, as well as appellant's statement, were substantially similar to evidence previously of record.

## LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against compensation at any time on his own motion or on application.<sup>6</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup>

A request for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.<sup>8</sup> If it chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>9</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>10</sup>

## ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant has not shown that OWCP erroneously applied or interpreted a specific point of law; nor has he advanced a relevant legal argument not previously considered by OWCP. In support of his request for reconsideration, appellant submitted a statement asserting that the hearing representative in the November 27, 2018 decision had already accepted that the medical evidence established causal relationship between the progression of his preexisting right shoulder condition and the accepted April 26, 2018 employment incident. However, the Board notes that the hearing representative did not make any findings on causal relationship and instead remanded the case to OWCP for referral to a DMA for an opinion on whether appellant's right shoulder conditions were caused or aggravated by the accepted employment incident. Thus, appellant has not provided any relevant legal argument not previously considered by OWCP. Therefore, he is

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<sup>6</sup> *Id.* at § 8128(a); *see M.S.*, Docket No. 19-1001 (issued December 9, 2019); *L.D.*, Docket No. 18-1468 (issued February 11, 2019); *see also V.P.*, Docket No. 17-1287 (issued October 10, 2017); *W.C.*, 59 ECAB 372 (2008).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3); *see L.D.*, *id.*; *see also K.L.*, Docket No. 17-1479 (issued December 20, 2017); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

<sup>8</sup> *Id.* at § 10.607(a). The one-year period begins on the next day after the date of the original contested decision. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>9</sup> *Id.* at § 10.608(a); *see also M.S.*, 59 ECAB 231 (2007).

<sup>10</sup> *Id.* at § 10.608(b); *M.S.*, Docket No. 19-0291 (issued June 21, 2019); *E.R.*, Docket No. 09-1655 (issued March 18, 2010).

not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>11</sup>

The underlying issue in the case is whether appellant has provided sufficient medical evidence to establish that he sustained a shoulder condition of an aggravation of his preexisting shoulder conditions as a result of the accepted April 26, 2018 employment incident.

Appellant's request for reconsideration was accompanied by a December 12, 2019 statement from Dr. Shaikh who opined that the accepted April 26, 2018 employment incident was "the sufficient mechanism" to aggravate and cause tear progression of his right rotator cuff. While this statement is new, it is not relevant as it is substantially similar to his February 21, 2019 letter finding that the accepted April 26, 2018 employment incident was "a sufficient mechanism" to aggravate and cause tear progression of appellant's right rotator cuff. Providing additional evidence that either duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.<sup>12</sup> As appellant did not provide relevant and pertinent new evidence, he is also not entitled to a merit review based on the third requirement under section 10.606(b)(3).<sup>13</sup>

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>14</sup>

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C § 8128(a).

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<sup>11</sup> *A.G.*, Docket No. 20-0290 (issued June 24, 2020); *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>12</sup> *See G.J.*, Docket No. 20-0071 (issued July 1, 2020); *V.Q.*, Docket No. 19-1309 (issued January 3, 2020); *Eugene F. Butler*, 36ECAB 393, 398 (1984).

<sup>13</sup> *Supra* note 7 at § 10.606(b)(3)(iii); *T.W.*, Docket No. 18-0821 (issued January 13, 2020).

<sup>14</sup> *D.G.*, Docket No. 19-1348 (issued December 2, 2019).

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 2, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2021  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board